

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CITY OF SOUTH BEND,
Plaintiff,
vs.
SOUTH BEND COMMON COUNCIL,
ET AL.,
Defendants.
BRIAN YOUNG, SANDY YOUNG,
TIMOTHY CORBETT, DAVID WELLS,
and STEVE RICHMOND,
Plaintiffs,
vs.
THE CITY OF SOUTH BEND, Acting
Through its Police Department,
DARRYL BOYKINS, Individually
and in his Official Capacity as
Chief of Police, KAREN DEPAEPE,
and SCOTT DUERRING,
Defendants.

CAUSE NO.:
3:12-cv-475

CAUSE NO.:
3:12-cv-532-JVB-CAN

The deposition of: THOMAS FAUTZ.
DATE: Tuesday, April 16, 2013.
TIME: 4:36 p.m. EST.
PLACE: May, Oberfell and Lorber
4100 Edison Lakes Parkway
Mishawaka, Indiana 46545

Called as a witness by the defendants, Scott
Duerring and Karen Depaepe, pursuant to notice of deposition
as to date, place and time, and in accordance with the
Indiana Rules of Civil Procedure, and as reported by
MICHELLE A. WHITAKER, Notary Public, RPR, Associate
Reporter.

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18 ALSO PRESENT:
19 Scott Duerring
20 Darryl Boykins
21 Brian Young

22 THOMAS FAUTZ DEPOSITION EXHIBITS:
23 2 - Sworn statement of Thomas Fautz
24 4 - Office of professional standards, seven-page document
25 (Exhibits Two and Four marked in a previous deposition and
utilized herein.)
6 - Position description
—o0o—

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COPY

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1 Tuesday, April 16, 2013 --
2 (All parties present in the conference room
3 at or about 4:36 p.m. Witness sworn.)

4 THOMAS FAUTZ
5 Having been first duly sworn, then testified as
6 follows:
7 DIRECT EXAMINATION
8 BY MS. DUERRING:

9 Q. Can you go ahead and state your name.
10 A. Thomas Fautz. F as in Frank, a-u-t-z as in zebra.
11 Q. How do you prefer I refer to you today?
12 A. "Tom" is fine.
13 Q. Okay. Tom, have you ever been deposed before?
14 A. Yes.
15 Q. Just a couple ground rules before we get started.
16 Obviously, you need to answer out loud for purposes of the
17 court reporter. Try to avoid nodding the head or shaking
18 the head or um-hums or huh-ums, 'cause they don't go down
19 very clearly on the record. And I'll try to remind you if
20 you have that tendency.
21 If I ask a question that you don't understand,
22 please indicate that to me so I can rephrase it or repeat
23 it. Otherwise, I'm going to assume that you understood the
24 question that I asked and your response reflects that
25 understanding.

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1 some people were claiming that they didn't want to come down
2 to the police station, they felt intimidated. So, we --
3 through the park department, human rights commission, we
4 obtained space over there on a bus line, handicap
5 accessible, allowing people to go there for complaints. So,
6 we really felt -- we added IA pro to track individual
7 officers. We were trying to do everything we could to be as
8 transparent with the public yet document what we were doing.

9 At that time, Chief Eugene Kyle, who was the
10 detective chief, had requested that his line be taped.

11 Based on that conversation, it opened the door of what other
12 lines do we want to tape. Decided that my line would be
13 taped, Chief Kyle's line would be taped, and that Jim
14 Hassag, who was the uniform chief at the time, that his line
15 would be taped, all with everybody's knowledge.

16 And Chief Kyle's specific request, he asked that
17 it be taped. The rest of us said, "Well, yeah, that's the
18 way to document." It would be a useful tool for that
19 individual person whose office it was at to use to be able
20 to document conversations and anyone that called in, to show
21 that we were responsive.

22 At the same time, because internal affairs was
23 moving into their suite and John — Lieutenant John Collins
24 was the investigator for that section, one of the lines in
25 internal affairs was taped as well. And John Collins was

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1 made aware of that.

2 So, as far as -- as far as I can select --
3 recollect, the only time I requested that any changes be
4 made that was -- was that one time. And that was to add
5 those particular lines.

6 Q. Okay. Now, it sounds like you basically were
7 designating lines that were associated with the officers
8 that were in positions of authority. Is that fair to say?

9 A. Positions of authority, we didn't -- like the
10 services chief or the community relations chief, they really
11 didn't deal with a whole lot of specific complaints about
12 not investigating properly or internal-affairs-type things
13 or complaints against officers, so theirs were not included.

1.4 But Chief Kyle, who was in the investigative
1.5 division, and Chief Hassag, who ran the uniform division,
1.6 which is usually the most high-profile area, and myself,
1.7 those were the ones, you know, that we designated.

18 Q. So, if I understand you correctly, these chiefs
19 that were in positions that frequently dealt with the
20 public?

21 A. Correct.

22 Q. And these were the individuals that, I guess for
23 lack of a better word, would be subjected to potential
24 complaints?

25 A. Correct. And it provided them with a tool that

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1 the lead -- leading expert there, and anything you would
 2 want done or you requested something for a case, you would
 3 have to go through Karen, who has the ability to monitor or
 4 make copies of tapes.

5 **Q. Okay. Now, Karen's position was communications**
 6 **director while you were there. Is that correct?**

7 A. Yes.

8 **Q. And is it fair to say that you were in Karen's**
 9 **direct chain of command?**

10 A. Well, she reported directly to Chief Kilgore, but
 11 then I was in charge of the department.

12 THE DUERRING: Pass the witness.

13 CROSS EXAMINATION

14 BY MR. DIXON:

15 **Q. You gave a sworn statement, right, to Mr. Pfeifer,**
 16 **at his law firm in October of 2012, right?**

17 A. Yes.

18 **Q. Did you review that in anticipation of this**
 19 **deposition?**

20 A. Yes, I did. And I did find one mistake.

21 **Q. I'm not --**

22 A. Oh, okay.

23 **Q. I'll let you go to that, but you'll knock me off**
 24 **stride.**

25 A. Sure.

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1 **Q. Do you have it with you now?**

2 A. I have just been handed a copy.

3 **Q. Okay. Turn to page four. Let's look at lines**
 4 **nine through eleven. I'll just read it and you can confirm**
 5 **if I've read it correctly. Okay? "There was one line in**
 6 **that section that belonged to Chief Eugene Kyle, and upon**
 7 **his request, that line was, on my authority taped." Right?**
 8 **That's what it says?**

9 A. Yes.

10 **Q. Is that the mistake that you're talking about?**

11 A. No.

12 **Q. Okay. So, that's a correct statement? All --**
 13 **everything I read there is a correct statement of yours?**

14 A. Chief Kyle requested his line be taped, and it
 15 was.

16 **Q. On your authority?**

17 A. Yes.

18 **Q. In other words, you were ultimately the one who**
 19 **said yes, that's okay to do?**

20 A. Yes.

21 **Q. And if you would have said no, then it wouldn't**
 22 **have been done?**

23 A. No, it wouldn't have.

24 **Q. And if Kyle had come to you and said I want to get**
 25 **some dirt on my neighbor who keeps calling in on me for --**

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1 **you know, I sold him a car and it's a lemon, can you tape my**
 2 **line, you would have said no?**

3 A. I can't say definitely no. I'd have to hear
 4 everything about it, and I would probably consult the city
 5 attorney on it.

6 **Q. From my description, would that -- would that**
 7 **appear to you -- just in your opinion. I'm not asking you**
 8 **to make a legal judgment. But from my description -- and**
 9 **I'll repeat it. He says I want my line recorded because I**
 10 **sold a car to my neighbor that's a lemon and now he's giving**
 11 **me a hard time about it.**

12 A. Well, giving a hard time --

13 MR. PFEIFER: Objection. Asked and answered,
 14 first of all. And secondly, I don't even know
 15 that there's a question.

16 MR. DIXON: I didn't -- well, I want to
 17 finish the question.

18 MR. PFEIFER: Okay.

19 **Q. So, would that appear -- would recording that line**
 20 **based just on that information that I gave to you -- would**
 21 **that appear to you to be a law enforcement purpose?**

22 A. On what you said right there, if there's no
 23 threats, "I'm gonna kill you," those kinds of things, I
 24 would probably say no.

25 MR. DIXON: Okay. I don't have any further

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1 questions. Thank you.

2 CROSS EXAMINATION

3 BY MR. PALMER:

4 **Q. Under your command, was the recording system ever**
 5 **used to intimidate anyone?**

6 A. Not -- not to my knowledge.

7 **Q. Was that a motivation for implementing the**
 8 **recording system?**

9 A. No. It was -- it was to gather evidence and --
 10 and serve as a tool for those individuals who had their
 11 lines taped to either defend themselves or document what had
 12 taken place.

13 **Q. And that would be the same answer if I asked you**
 14 **if the motivation was to embarrass or harass anyone?**

15 A. I would not put up with that.

16 **Q. The answer would be the same, that that was not a**
 17 **motivation?**

18 A. Yes.

19 **Q. Would you consider the purposes to document**
 20 **complaints and to use as a tool to be a legitimate business**
 21 **purpose?**

22 A. Yes.

23 **Q. In your opinion or to your knowledge, is the**
 24 **recording of lines into a police station something that's**
 25 **ordinarily done by other police stations around the country?**

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1 MR. PFEIFER: Object to the form of the
2 question unless you identify which lines you're
3 talking about. Are you talking about all lines or
4 certain lines. So, I'll object to the form of the
5 question.

6 MR. PALMER: All lines.

7 MR. SULLIVAN: Objection. Lack of
8 foundation.

9 Go ahead.

10 A. Could you repeat the question. I want to --

11 Q. To your knowledge, is it ordinary and customary
12 for police departments around the country in the United
13 States to record at least some lines coming into the
14 office -- into the station?

15 A. Yes.

16 MR. SULLIVAN: Same objection.

17 Q. And what do you base that answer on?

18 A. Just good business practices. I mean, in this day
19 and age, you certainly -- in a 911 call, it happens so
20 quick, sometimes you want to go back and hear exactly what's
21 said. Provides evidence. I'm sure smaller agencies maybe
22 don't. But agencies the size of South Bend would certainly
23 have some type of a recording system, I would think. Can't
24 say specifically, but I would think.

25 Q. How did you come about this knowledge? Was it

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1 through discussions with other police chiefs? through
2 reading? Your knowledge about use of recorded lines in
3 other police stations.

4 A. I guess I would just be speculating, because I
5 can't say for sure. I mean, I have worked investigations
6 with other departments where, you know, they had evidence,
7 or just watching on TV, you know, when they play 911 tapes
8 and those kind of -- type of things. I would assume that
9 most police departments would, you know, capture that.

10 Q. And it's not simply for 911 calls, if I understand
11 your testimony. It's also to document complaints about
12 individual officers or procedures that the police department
13 have employed in following up?

14 A. I really can't speak for --

15 Q. For your --

16 A. I'm trying to act as an expert here talking about
17 other departments.

18 Q. Let me rephrase the question.

19 A. But I think it's common practice.

20 Q. Let me rephrase the question. In your
21 department -- in the South Bend Police Department, it was
22 not simply for 911 calls that you taped lines, but it was
23 also to document complaints from the public and to, as you
24 said -- used the word, be transparent with the public?

25 A. Yes.

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1 MR. PALMER: That's all the questions I have.

2 CROSS EXAMINATION

3 BY MR. SULLIVAN:

4 Q. Chief, who followed you in the position of South
5 Bend Police Department chief?

6 A. Chief Darryl Boykins.

7 Q. Chief Boykins. And was he a division chief under
8 you before that?

9 A. Yes, he was.

10 Q. What --

11 A. He was the uniform division chief.

12 Q. Okay. Was he in that position when -- if memory
13 serves me, I think you were describing conversations that
14 you had to establish this practice of recording some of
15 these lines. Was he a part of those conversations?

16 A. No.

17 Q. Okay. Why not?

18 A. He wasn't in that position at that time.

19 Q. Do you recall what position he was in at that time
20 those conversations took place?

21 A. He would have been a captain. I believe he might
22 have been with internal affairs, but I -- I can't say for
23 sure.

24 Q. That's fine.

25 Now, when you were chief of police, it was one of

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1 your responsibilities to establish practices and procedures
2 for the department?

3 A. Yes.

4 Q. Okay. Is the policies for the South Bend Police
5 Department contained in the duty manual?

6 A. Yes.

7 Q. If the duty manual is changed, does that have to
8 be approved by the board of public safety?

9 A. Yes.

10 Q. But as far as the practice that occurs in the
11 department, you don't go to the board of public safety for
12 that?

13 A. No.

14 Q. That was under your authority to develop and
15 establish practices and procedures?

16 A. Yes. Yes.

17 Q. Was it ever the practice of the South Bend Police
18 Department, while you were the chief, to designate certain
19 division chiefs as having telephone lines to be recorded at
20 all times? That is, the position rather than the person who
21 happened to be in the position? Was it ever the practice?

22 A. No.

23 Q. Did you ever intend to establish that practice?

24 A. No.

25 Q. Was it ever the practice of the South Bend Police

6 (Pages 21 to 24)

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1 know about it. And we weren't out there to broadcast it or
2 put on the news that anybody calling in to internal affairs
3 would be taped.

4 **Q. I'm not talking about making a press release. I'm**
5 **talking about letting police officers -- all the police**
6 **officers on the department know which lines are recorded.**

7 MR. SULLIVAN: Objection. Argumentative.
8 Asked and answered.

9 **Q. Well, I mean, that's what my -- that's what my**
10 **question is. Is that -- is it the same answer with that**
11 **question?**

12 A. Yeah. I mean, you know, I guess there's a lot of
13 ways -- in looking back on things, could you have done
14 things differently? Certainly. Did what we thought was
15 best at the time, and, you know, that's pretty much it.

16 **Q. Well, I'm just trying to understand this**
17 **expectation of privacy. And it's an important issue in this**
18 **case. And I'm also trying to understand what procedures you**
19 **implemented in order to presumably protect that expectation**
20 **of privacy. I'm not trying to second-guess you. I'm just**
21 **trying to understand how things went on back then.**

22 **Did -- do you believe that a police officer had an**
23 **expectation of privacy in their own -- just in the space of**
24 **their own office?**

25 MR. SULLIVAN: Objection. Vague. And it

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1 calls for a legal conclusion.

2 Go ahead.

3 A. I mean, you know, could you be a little more
4 specific what -- like, searching their desk or those --
5 those kinds of things? I mean -- or peeking in the window
6 or -- you know, I'm not --

7 **Q. Just anything. If they -- if an officer goes into**
8 **his private office and closes the door, does he have an**
9 **expectation of privacy?**

10 MR. SULLIVAN: Objection. Vague. Calls for
11 a legal conclusion.

12 Go ahead.

13 A. I don't know the legal conclusion. I would say
14 out of just common courtesy, yes.

15 **Q. I've been informed that when you became chief of**
16 **police you had your office searched for bugs. Is that**
17 **correct?**

18 A. I think --

19 MR. PFEIFER: Objection. Relevance.

20 MR. SULLIVAN: Lack of foundation.

21 MR. PFEIFER: And outside the scope of what
22 these depositions are intended to encompass.

23 MR. DIXON: No. It's right within the -- the
24 whole issue is the expectation of privacy. If he
25 didn't -- if the chief didn't have an expectation

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1 of privacy in his own office when he became the
2 chief of police, that runs directly to the issue
3 of whether or not a police officer has an
4 expectation of privacy on the telephone line.

5 That's the equipment of the city.

6 MR. PFEIFER: I made my objection.

7 **Q. So, did you have your office searched for bugs**
8 **when you became the chief of police?**

9 A. I think all the chiefs did. It's kind of a
10 common-type thing.

11 MR. DIXON: All right. Thank you. I don't
12 have any other questions.

13 RECROSS EXAMINATION

14 BY MR. PALMER:

15 **Q. Tom, you -- you testified at great length your**
16 **practices regarding what you would do when you either added**
17 **or if a situation would come up where you were terminating a**
18 **line that was being taped, that you would have an officer**
19 **consent to it. You've testified as to your -- what your**
20 **practices were?**

21 A. Yes.

22 **Q. Were those practices ever reduced to writing?**

23 A. No.

24 **Q. Were those practices ever passed on from a prior**
25 **police chief to you?**

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1 A. No.

2 **Q. Were those practices ever passed on from you to**
3 **Chief Boylkins?**

4 A. No. Other than the conversation about, you know,
5 it's your option.

6 **Q. You also testified as to director of**
7 **communications having, within the scope of that job,**
8 **listening to tapes in -- in respect to maintaining the**
9 **system or if the state police requested or if there was a**
10 **FOIAR -- FOIA request. If the director of communications**
11 **was listening to the tapes within the scope of her**
12 **employment and heard something that he or she believed was**
13 **relating to illegal contact -- illegal conduct, would it be**
14 **within the course and scope of her employment to inform**
15 **someone higher up the chain of command?**

16 A. Yes.

17 **Q. The same question regarding unethical conduct.**
18 **Would it be within her scope and course of employment to**
19 **relay that to someone higher in the chain of command?**

20 A. Yes.

21 MR. PALMER: That's all the questions I have.

22 RECROSS EXAMINATION

23 BY MR. SULLIVAN:

24 **Q. Chief, appreciate your patience a little more. Do**
25 **you recall the questions from -- I think it was Attorney**

16 (Pages 61 to 64)